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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KIRBY GAINES, Defendant and Appellant.	B204680 (Los Angeles County Super. Ct. No. SA060393)

APPEAL from a judgment of the Superior Court of Los Angeles County. Scott T. Millington, Judge. Affirmed.

Joanie P. Chen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie C. Brenan and Jason Tran, Deputy Attorneys General, for Plaintiff and Respondent.

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Kirby Gaines (appellant) was convicted by a jury of second degree robbery. (Pen. Code, § 211.)[1] In bifurcated proceedings, the trial court found true that appellant had a prior serious felony conviction that required he be sentenced pursuant to the "Three Strikes" law and to a five-year enhancement. (§§ 667, 1170.12.) It also found that he had served two separate prison terms for a felony. (§ 667.5, subd. (b).) At sentencing, the trial court denied his motion to strike prior convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and imposed an aggregate term of 11 years in state prison.

On appeal from the judgment, he contends that the evidence of identity is insufficient to support the judgment. We find the contention to be meritless and affirm the judgment.

FACTS

I. The Prosecution's Case-in-chief

On May 20, 2006, two 7-Eleven store employees, Janet Porres (Porres) and Shawntel Yow (Yow), drove to a Hawthorne bank to get store change for $1,700 in currency. In the bank's parking lot, Porres had the bag of store currency and her purse in her hand. A tall African-American male approached and grabbed the bag and Porres's purse, causing Porres to fall to the ground. The man dragged Porres 14 feet until she could no longer hold onto the bag or her purse. He ran from the parking lot with the bag and her purse.

Two bank customers, Jose Gonzalez and his uncle, gave chase. During the pursuit, the robber attempted to hit them with Porres's purse. The robber got into a white car with paper license plates. As the robber entered the car, he yelled to the driver, "Get the gun out," and the getaway car drove off. A bystander, Stephen Cox (Cox), followed the Chrysler in his own car and lost the Chrysler on the 405 Freeway. In a 911 call, Cox

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

described the getaway car as a white Chrysler Imperial with paper plates and with a numeral "26" affixed to the back window.

Police officers found the Chrysler near the Manchester offramp just off the 405 Freeway. By this time, there was only one occupant in the Chrysler, its driver. There was a short, high-speed pursuit. Suddenly, the Chrysler stopped, and the driver, Anthony Haywood (Haywood), got out and demanded to know why the officers were in pursuit. The officers arrested Haywood. Inside the Chrysler, the officers found a black baseball cap and an orange plaid shirt. They also found a purse containing identification belonging to "Maya Nicole Jenkins" (Jenkins). Jenkins was an employee of another 7-Eleven store who had been hanging out at the 7-Eleven store that morning before Porres and Yow went to the bank.

During an infield identification procedure, Cox identified the Chrysler as the getaway car and Haywood as the Chrysler's driver. Five days later, Cox participated in a six-pack identification procedure. Cox identified a person in the six-pack other than appellant. At trial, when asked whether he could identify anyone in the courtroom, Cox replied that he could not.

At trial, Cox described the robber as being stocky, bald, and wearing a white T-shirt. When interviewed after the pursuit, Cox told the officer that the robber was in his late 20's or early 30's, was approximately six feet one inch tall, had a heavy build, and was wearing blue jeans.[2]

Gonzalez participated in a six-pack identification procedure. He was unable to identify the robber.

Porres testified that she got a good look at the robber. On May 24, 2006, she participated in a six-pack identification procedure. Appellant was not among those depicted. Porres selected one man whom she said "looked the closest to" the robber. The

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[2] The detective testified that at the time of trial, appellant was about six feet two inches tall and weighed 240 or 245 pounds.

next day, Porres participated in another six-pack identification procedure in which appellant was depicted. She quickly identified appellant and explained that he had "very distinct eyes" due to their shape and size and that his eyes were widely spaced on his face. Porres was "100 percent" sure of her out-of-court identification.[3]

On November 2, 2006, Porres identified appellant at a live lineup. She testified that appellant looked different because he had put on weight and was now wearing an eye patch. Porres remained "90 percent sure" of her identification. Later, at the preliminary hearing and at trial, Porres identified appellant as the robber. At trial, she testified that she was sure it was appellant because of the "distinct eyes" and because the size of the "eyes really stood out in my head."

On May 24, 2006, Yow participated in a six-pack identification procedure. She recognized appellant as the robber because "his eyes are set wide apart and they're large." She said that his eyes were the "distinguishing feature" that she recalled from the time of the robbery. At the November 2, 2006, live lineup, Yow selected another man in the lineup as the robber. She explained that at the lineup, her memory of the robbery was not "fresh." Also, appellant was wearing an eye patch. She was certain of her identification based on his wide set eyes, but the eye patch had interfered with her perceptions about that aspect of his appearance, which was critical to her identification during the live lineup.

Yow identified appellant at trial when he appeared without the eye patch. At trial, she testified that she was "98 percent sure" that appellant was the robber. She also said that appellant looked "heavier" at trial. Yow said the robber was a five-foot-10-inch

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[3] The detective explained that initially, he found the name of one man in Jenkins's wallet and obtained a photograph of him. On May 24, 2006, the detective showed a six-pack identification card to Porres containing this suspect's photograph. Later that day, he obtained information that there was a fingerprint match to appellant. He prepared a new six-pack identification card containing appellant's photograph and showed it to the remainder of the eyewitnesses. On May 25, 2006, he also showed the card containing appellant's photograph to Porres.

male with a medium complexion. During the robbery, the robber was wearing a baseball cap that looked as if it was too small for him—it looked as if it was perched on top of his head.

On May 24, 2006, a fingerprint technician recovered a latent fingerprint on the Chrysler at the tow yard. The latent fingerprint was located on the inside of the front passenger door handle of the Chrysler. The print was the size of a "little more than half" of appellant's finger. It belonged to appellant.

II. The Defense

The police officer who interviewed Porres, Yow, and Gonzalez at the crime scene testified to the physical descriptions of the robbers he was given by the eyewitnesses. Porres told him that the robber was a six-foot-one-inch tall African-American male. The robber was wearing a dark hat, white undershirt, a plaid shirt with red in it, and dark jeans. Yow told the police officer that the robber had a medium build and was a six-foot-one-inch-tall African-American male. He was wearing a "dark baseball hat, a white shirt, and an outer shirt with red on it." Gonzalez described the robber as a medium-build, six-foot-four-inch African-American male who wore a dark hat.

A psychologist testified as to the general factors that might affect the reliability of an eyewitness's identification. These factors included conscious transferring, cross-racial identification, and the effect of passage of time. The expert gave his opinion that an eyewitness's confidence in an identification is not a reliable indicator of accuracy.

DISCUSSION

Appellant contends that the evidence is insufficient to support the judgment. We disagree.

In *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200, the court reiterated the well-established standard of review: "'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that

a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]'" (*Whisenhunt, supra*, at p. 200, citing *People v. Guerra* (2006) 37 Cal.4th at 1067, 1129.)

At the threshold, insofar as appellant is claiming the identification procedures employed by the police were impermissively suggestive and thus violated due process, these claims are forfeited by his failure to raise them in the trial court. (*People v. Medina* (1995) 11 Cal.4th 694, 753, 783.)

Appellant argues that the eyewitness identification evidence was unreliable and cites the decision in *People v. Trevino* (1985) 39 Cal.3d 667, 697 for the proposition that a "solitary fingerprint of some unknown vintage" is legally insufficient to support a conviction.[4] Based on that proposition, he asserts that his latent fingerprint found on the getaway car was insufficient to identify him as the robber because there was no evidence that the Chrysler was in safekeeping prior to fingerprinting, nor was there any reliable evidence that appellant's fingerprint was on the Chrysler on the date of the robbery. He speculates that the fingerprint could have been placed on the Chrysler's door handle on a date well before the robbery, or that someone could have planted the fingerprint on the Chrysler after the driver's arrest and before the technician examined the door handle for fingerprints.

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4 The decision in *People v. Trevino, supra*, 39 Cal.3d 667 was disapproved on another point in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221.

The contention amounts to nothing more than an invitation to this court to reweigh the evidence and substitute its judgment for that of the jury. That is not the function of an appellate court. (*People v. Culver* (1973) 10 Cal.3d 542, 548.) Porres had a good opportunity to see appellants' face during the robbery. She identified him in a post-offense six-pack identification procedure, at the live lineup, and during the in-court proceedings, including at trial. She was sure of her identification. Yow identified appellant during the post-offense six-pack identification procedure. She could not identify him at the live lineup, but appellant had put on weight, and Yow believed that the eye patch he wore interfered with an accurate identification. At trial, appellant was no longer wearing the eye patch, and Yow again identified appellant as the robber and explained to the jury why she had had difficulty at the live lineup making an identification.

Also, four days after the robbery, at the tow yard, a police technician had found appellant's partial print inside the Chrysler's passenger door handle. While that fingerprint could not be dated, it was sufficient circumstantial evidence to corroborate the identification testimony and to demonstrate that appellant was acquainted with Haywood, the Chrysler's driver, or Jenkins. Any conflicts or discrepancies in the identification evidence and the weight of that testimony were issues for the jury to resolve.

Appellant claims that the decision in *People v. Trevino, supra*, 39 Cal.3d at page 697 is determinative of his contention on appeal. There, the defendant was charged with the murder of the occupant of an apartment. Defendant's fingerprint was found on a dresser drawer in the ransacked apartment after the murder, but the defendant had previously been a visitor at the apartment. The eyewitness could not say whether the defendant was the second person she saw at the apartment about the time of death; she testified to only a vague resemblance between the defendant and that second person. Her other vague identification testimony connecting the defendant to the crime was conflicting. (*Id*. at p. 696.) On appeal, the court held that the "highly speculative and equivocal identification testimony and the solitary fingerprint of some unknown vintage

do not constitute evidence which is 'reasonable, credible and of solid value.'" (*Id.* at p. 697.)

Trevino is distinguishable from the present case. The identification evidence here is not speculative, but solid and reasonable evidence consisting of two positive identifications by two of the eyewitnesses and descriptions by another of the eyewitnesses that generally fits appellant's physical appearance. In the instant case, the latent fingerprint provides some relevant circumstantial evidence of identity in that finding the fingerprint on the interior of the Chrysler's passenger door handle indicates that appellant was acquainted with the getaway car's driver, Haywood, or Jenkins.

Moreover, contrary to appellant's claim, the police testimony established the chain of custody for the Chrysler: there was evidence that after Haywood's detention, the Chrysler was towed to a police tow yard and held there for its possible evidentiary value. It was highly unlikely that in this garden-variety, non-notorious robbery that the police would tamper with the Chrysler or plant appellant's fingerprint prior to the technician's arrival to look for latent fingerprints. The weight of the direct and circumstantial evidence of identity were issues for the jury to resolve.

DISPOSITION

The judgment is affirmed.

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_____, P. J.
BOREN

We concur:

_____, J.
ASHMANN-GERST

_____, J.
DOI TODD